UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW YORK

Case No. 05-44481-RDD

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In the Matter of:

DELPHI CORPORATION,

Debtor.

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United States Bankruptcy Court

One Bowling Green

New York, New York

March 17, 2009

10:18 PM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

HEARING re Response to Debtors' Motion for Order Authorizing an Approving Option Exercise Agreement (the "Steering Option Exercise Motion").

HEARING re Objection to Motion Limited Objection f the Official Committee of Unsecured Creditors to the Debtor's motion for order under 11 U.S.C. Section 363 and Fed.R. Bankr. P. 6004 authorizing and approving option exercise agreement with General Motors Corporation.

HEARING re Affidavit of Service filed by Robert J. Rosenberg on behalf of Official Committee Of Unsecured Creditors.

HEARING re Objection to Motion Limited Objection of Wilmington Trust Company, as Indenture Trustee, to Motion for Order Under 11 U.S.C. 363 and Fed. R. Bankr. P. 6004 Authorizing and Approving Option Exercise Agreement with General Motors Corporation.

HEARING re Affidavit of Service re Notice Of Adjournment Of Claims Objection Hearing With Respect To Debtors' Objection To Proof Of Claim No. 1406 (Autopartes De Precision, A Division Of Miniature Precision Components).

Transcribed by: Pnina Eilberg

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P R O C E E D I N G S

THE COURT: All right. Delphi.

MR. BUTLER: Your Honor, good morning. Jack Butler, Al Hogan, Kayalyn Marafioti from Skadden on behalf of the debtors in connection with this hearing.

Your Honor, there have been, in connection with prior orders of the Court involving the salaried OPEB termination motion filed by the debtors, two notices of appeal filed. There was a notice of appeal filed at Docket #16404 that appealed from Your Honor's provisional, that appealed from Your Honor's provisional salaried OPEB termination order at Docket # 16380. And there was a second notice of appeal at Docket #16458. That appealed from Your Honor's final OPEB termination order at Docket #16448.

In addition -- and those were both of those notices of appeal. The first notice of appeal was filed by the Delphi Salaried Retirees Association and the second notice of appeal was filed on its face by the Delphi Retiree Committee. I think there is a question as to whether the Delphi Retiree Committee was authorized to actually appeal from the order in terms of their limited appointment. From the debtors' perspective, we're prepared to treat it as an appeal from the Delphi Salaried Retirees Association. But I think there is a question here as to that notice of appeal having been filed. Whether it should be filed by the Retirees Committee or by the Delphi

Salaried Retirees Association, they're represented by the same law firm. Mr. Gloster's here in court today.

Putting aside that issue, the parties are prepared to deem -- have those notices of appeal deemed to be consolidated, and the motion that was filed for a stay pending appeal that was filed by the Delphi Salaried Retirees Association at Docket #16426 would be a motion to cover the consolidated appeal in terms of staying both of those orders.

The debtors filed a response, an objection to the motion, at Docket #16457 and the Delphi Salaried Retirees Association filed a response at Docket #16467. So the procedural -- a couple of procedural questions is, one, in terms of consolidating the appeals the debtors have no objection. We'd actually support that procedurally. We agree that the stay hearing today applies to both notices of appeal. We think there is the question that ought to be clarified on the record as to whether the notice of appeal of the final order should be deemed a notice of appeal from the Retirees Committee, which was not appointed for that purpose, or from the Delphi Salaried Retirees Association as these matters are consolidated.

In terms of arguing these matters today, my colleague, Mr. Hogan, who is going to be handling the appellate matters for the debtors in the appellate courts, is going to prosecute the objection today and Mr. Gloster's here on behalf

of, I gather, the Delphi Salaried Retirees Association and the Delphi Retiree Committee.

THE COURT: Okay. Before we get into the argument on the motion for a stay pending appeal, I'm not quite sure what you're asking from me with regard to who is the proper party to the appeal, ostensibly, by the committee that I authorized to be appointed. Frankly, that's not something I really thought about until you mentioned it, but it seems to me that the issue of who is entitled to appeal, I think, probably now is an issue that the District Court has, right?

MR. BUTLER: Well Your Honor, the reason I think Your Honor has --

THE COURT: I mean, there may be an issue as to whether, ultimately they're entitled to be paid for it under my order and I guess that's something I would have to ultimately deal with. But in terms of whether --

MR. BUTLER: Well --

THE COURT: -- it's an entity that's permitted to appeal, and I would think that that's ultimately a standing issue, that the District Court would have because it now has the appeal.

MR. BUTLER: Well, Your Honor was very clear in your order to indicate, and we can raise this point, I just wanted the record here to have the information on it. The reality is that there is, I think, and we're trying to avoid procedural

defects here so that we don't end up with the wrong appeal by a party not entitled to appeal in the wrong place and that doesn't do anyone any good. We want to have a procedurally effective record but the reality is your orders were very clear that the Retirees Committee was appointed for very limited purposes. Your final order found that their responsibilities were discharged and there was a budget set. And now we have an appeal from that group which was outside of the scope of the authority of the order. And I think this Court retains jurisdiction over the statutory committees it appoints.

And I don't think that an appeal, however providently filed divests this Court over jurisdiction of its statutory committees. And we're not trying to confuse the appeal itself, we're quite prepared to deem it an appeal of the Delphi Salaried Retirees Association. The issue should be joined. It's just a matter -- I'm not sure why Mr. Gloster chose to style it from the Retirees Committee as opposed to from the Association; he represents both of them. One has an absolute right of appeal, one does not.

MR. GLOSTER: If I could briefly respond, Your Honor?

THE COURT: Well, okay. But I'd like you to focus on whether this is an issue properly before me or before the District Court.

MR. GLOSTER: It's unnecessary.

THE COURT: Please stand up.

MR. GLOSTER: It's unnecessary for you to decide, Your Honor. The practicality is, before the 1114 Committee was appointed the DSRA opposed the initial motion to terminate all benefits as unvested. This Court appointed an 1114 Committee to address several issues, including modifying the Court's order as appropriate after negotiations with the debtor and it specifically authorized the committee to raise the issue about whether certain benefits were vested. That's what was dealt with at the second hearing. So the real -- the proper party in interest at the second hearing was, in fact, the 1114 committee. But we're prepared to treat the consolidated appeal as -- on behalf of both entities, the DSRA before the 1114 Committee was appointed, which opposed the first motion, and the 1114 Committee. So Your Honor doesn't have to address this at all.

THE COURT: Well, I guess -- the debtors are prepared to let the appeal go forward by the one entity?

MR. BUTLER: Absolutely, Your Honor.

THE COURT: So in that sense I don't need to address it. I think there still is an issue as to whether the estate should pay the appellant's costs, which would be the case, I guess, if the appeal was properly bought by the committee. And then, I guess, there's a second issue with regard to the committee being an appellant, which is whether the committee has standing pursuant to my order to pursue the appeal.

I think the first of those issues is one that I ultimately will deal with. I think the second issue, although obviously this is on the fly, there's no briefing on this, I think the second issue, the standing issue, is probably one for the District Court at this point, given that the appeal has already been noticed.

MR. BUTLER: Your Honor, I think if we agree, and I think I heard Mr. Gloster appeal that we can deem this as an appeal that has two parties in it, the DRSA, there's no objection to it.

THE COURT: Right. There's at least one party that has clear standing and that's fine.

MR. GLOSTER: That's correct, Your Honor.

THE COURT: Fine.

MR. GLOSTER: I think it's in everyone's interest to have all of the parties that are appealing bound by the same appeal.

THE COURT: Well, it just may be that the District Court concludes that under my order the committee didn't really have authority to appeal, but that's for whatever district judge has the matter.

MR. GLOSTER: I agree, Your Honor.

THE COURT: Okay.

MR. BUTLER: Thank you, Your Honor. So we've got -- for today we have --

THE COURT: And then -- I'm sorry. As a procedural matter then you all have reached an agreement with regard to certain confidential items on the record?

MR. BUTLER: Yes. Those have been filed, Your Honor.

THE COURT: Okay. Fine. And that's -- I just want to make sure we have all the parties in agreement on that, to the appeal.

MR. GLOSTER: That's my understanding although that agreement was reached with my colleague while I was on the plane but that is my understanding, Your Honor.

THE COURT: Okay. Very well. All right. So then let's turn to the issue of stay pending appeal.

(Pause)

MR. GLOSTER: Your Honor, initially in response to Delphi's opposition -- oh, I'm sorry, Your Honor. Dean Gloster of Farella Braun & Martel on behalf of the stay applicants and the 1114 Committee of Salaried Retirees.

Initially let me say, Your Honor, that actually the scope of what we're asking for is less then what we had originally set out in our papers. I think Delphi has raised the issue that this is a non-trivial expense on Delphi's side of the table and frankly any relief that Your Honor grants should be limited to the -- the really critical harm that would be faced by retirees by the termination of these subsidies. And in further looking at this we think that the critical

problem is the loss of the healthcare benefits and the prescription drug benefits and not the vision care, the dental, the contribution of one percent of salary for 2,300 active employees. Those really are not in the same category of extreme hardship and irreparable injury. So that's the first issue.

And the second issue is, we filed the appeals as an expedited appeal, requested that they be expedited, filed the statement of issues and record on appeal, really as soon as we practically could. And it's in the interest of all the parties to have that appeal resolved as quickly as possible. So that it may well be, Your Honor, that a sixty day stay is all that we need here, not a ninety day stay.

THE COURT: And when you say sixty day stay, it would be only in respect of the termination of funding of the healthcare and the --

MR. GLOSTER: Prescription drugs.

THE COURT: -- prescription drug benefit?

MR. GLOSTER: That's correct, Your Honor. And as we see that the critical issue there is if the appellate court reverses, and we believe there is a substantial possibility of success because this is simply a statutory issue of what 1114 covers, whether amendable benefits are covered or not, the problem is that if participants in the healthcare plan are out of creditable coverage for more than sixty-three days, then

under 29 U.S.C. 1181 they lose the ability to roll into a new group health plan and have their preexisting conditions covered by that health plan.

And so what happens is, they would enroll in a group health plan that was some sort of follow on, here's what we've put together, here's what we've worked out under the 1114 process after it comes back to this Court. And the difficulty is, they would have to pay for their benefits for a full year before those benefits would cover preexisting conditions. And for retirees who are over fifty-five and under sixty-five, they commonly have preexisting medical conditions and those are typically the most expensive, most important issues that they face medically.

So as we see it, this is kind of a genie, and you can't put the genie back in the bottle once you've terminated these subsidies and people have fallen out of coverage. And as a practical matter people will fall out of coverage. When you go from a fully, almost fully, funded subsidized benefit to, in a relative short period of time, losing all of those subsidies and having confusing papers sent to retirees, lots of them are either not going to be in a financial position to continue those benefits or simply won't respond in time and will lose those benefits. And we think that that will create an enormous hardship and it satisfies the standards in the Second Circuit. We understand that this is expensive but the enormity of the

harm potentially suffered by retirees is considerable.

In addition, Your Honor, if Your Honor disagrees with that, we think that there's a practical reason for at least a thirty day stay here. The debtors' notices that initially went to retirees about electing the benefits to continue the benefits at their own cost had the wrong fax number about how one responded and had an explanation that if you responded by express mail that it wouldn't be necessarily effective.

In addition, the Congress passed and the President signed into law the American Recovery and Reinvestment Act which had substantial changes to COBRA benefit coverage, the continuing coverage. One of the changes it made was retroactive and it said if you lost your job between September 1st of 2008 and December 31st of 2008 then you would be entitled to COBRA continuation coverage and in fact there would be a sixty-five percent subsidy from the government -- there would be a sixty-five percent subsidy for a period of time.

The difficulty is that the regulations, the final regulations, on what event constitutes your termination for purposes of this COBRA, this extension of COBRA, the final regs are supposed to come out on March 19th; which means, that for people who left the company -- not you were terminated but rather we want you to leave on an early retirement, we ask you to leave -- there's some uncertainty, at least on the part of the retirees, about whether or not that's going to be covered

by these new provisions. And because of the tight time frames, I think that there's a high likelihood of real chaos here and people not getting benefits that they otherwise will be entitled to if there's not enough time to deal with this.

And finally, Your Honor, this Court charged our committee with negotiations with the debtor to try to modify this Court's order consensually and to -- on behalf of all retirees, to dismiss the appeal and to waive the retirees' right to appeal from this Court's orders. We've taken that very seriously. There have been discussions with Delphi. There have been exchanges of proposals, obviously there's no certainty as to that but there are very good reasons why both parties would want to settle that out and very good reasons that both parties have more to gain from the settlement then simply proceeding with an appeal.

As a practical matter, I think the most likely outcome of that is some sort of much lesser subsidy for a relatively short period of time through a VEBA, a Voluntary Employee Benefit Association, that's set up and charged with obtaining an affordable, lower cost, less rich set of benefits for the retirees that on a slight subsidy basis large numbers of retirees would opt into.

We had asked for information from the debtor that would allow us to go to vendors and price that; we've gotten almost all of the information we need. Assuming we can get the

rest promptly, we expect that we could roll out the benefit by July 1, under some kind of limited subsidy.

If that's the case, simply one more month of health benefits would mean that people would not be out of creditable coverage for more than sixty-three days by the time the new benefit rolled out. And a one month extension would mean that by the end of that month we would hope that we would be able to communicate with retirees and say this is what the benefit is going to be on July 1, as you consider your options of self-paying for the debtor's benefits or trying to find other coverage or going through one of these state catastrophic plans that doesn't constitute creditable coverage or however you might grapple with your healthcare issues, you should know that on July 1 we're rolling out this benefit and it's got the following monthly subsidy for this period of time. And it would be eligible for the health coverage tax credit in the future should the pension be turned over to the PBGC.

And in that connection, Your Honor, there's an advantage to the retirees for having the retiree committee essentially sponsor that plan, because under the current -- the new legislation passed as part of the American Recovery and Reinvestment Act, a benefit approved by this Court and put together through a VEBA by the debtor or by the committee is statutorily entitled to coverage by the HCTC through the end of December 2010. But after that period we are probably stuck

with what the law is before, certainly unless Congress extends that, which is that it has to be the 1114 Committee that goes to the IRS and gets a private letter ruling saying that this is set up in lieu of COBRA continuation coverage.

Finally, Your Honor, we disagree with the debtor as to the correct interpretation of the COBRA continuation provisions related to bankruptcy. We see that the clear reading of 29 U.S.C. 1163(6) is that a modification of benefits in bankruptcy, which under the regs include a cut of the subsidies from the employer, entitle the affected beneficiary to lifetime COBRA continuation coverage and that the one year period, saying that if it's within one year of bankruptcy, is simply a safe harbor. It says then it is deemed to be related to the bankruptcy.

So, Your Honor, we believe that --

THE COURT: What about the regs on that point?

MR. GLOSTER: The regs are at best unclear, Your Honor. And it may be, although I find it -- I do not know whether there is any intent to clarify that as part of the final COBRA regulations by the 19th.

THE COURT: Okay.

MR. GLOSTER: And that was not part of the ARRA.

THE COURT: Okay. I interrupted you; I think you were going to say something else.

MR. GLOSTER: Just, Your Honor, that these benefits

are absolutely critical for human beings. And I understand that Delphi is facing enormous pressures and enormous difficulty and this is an extraordinary time for the auto industry. But the very reasons that Delphi did not seek to terminate these benefits before now and has acknowledged that they are a substantial hardship are the same reason that this Court should at least maintain those benefits for sixty or ninety days as to the most critical component, to avoid irreparable injury while an appeal is being resolved where the parties are quickly striking an agreement to settle out that appeal.

THE COURT: Okay. I have a few questions on what you just went through. Has there been any quantification of the weekly or monthly cost of continuing just the healthcare and prescription drug benefits?

MR. GLOSTER: In fairness, Your Honor, that is the bulk of the cost. So the debtor estimated that the monthly cost was something, of all of these benefits, was something in the neighborhood of six million dollars.

My understanding, from conversations with counsel for the debtor, that vision and dental may be ten percent or no more than ten percent of that number. It sounds to us as though the one percent of salary contribution for the 2,300 active employees is similarly a small component of that. And certainly the historical information that Delphi gave us for

purposes of going to vendors and calculating a new benefit show that the cost of just the health benefits and the prescription drug benefits are something on the order of four million dollars a month.

THE COURT: Okay.

MR. GLOSTER: And that was going backward.

THE COURT: Okay. And then secondly, the issue of losing preexisting coverage, you say, is triggered after sixty-three days of not having --

MR. GLOSTER: Of not having creditable coverage --

THE COURT: -- creditable coverage.

MR. GLOSTER: -- which is, sort of, a statutory definition of that.

THE COURT: So given the debtor's supplemental notice and where things stand at this point, when is the first day that people would arguably lose supplemental coverage?

MR. GLOSTER: April 1st. So they would be out of creditable coverage April 1st if they don't continue to pay for their -- pay full freight for the existing benefits or find an alternate benefit at that point that is creditable coverage.

THE COURT: So you're basically looking at the end of June as the date when this -- June 1st?

MR. GLOSTER: Actually, I think it would be more like June 3rd, Your Honor. So if they lost it on April 1st, if they didn't roll into a new plan --

THE COURT: You're right, the beginning of June. Yes. Okay. And why was July 1st picked as a potential rollover date as opposed to June 1st or June 15th?

MR. GLOSTER: Because the process on our end looks something like the following. We need, in order to get vendors to commit to a program for people under sixty-five, it's very hard to get a group plan that doesn't have a problem called the death spiral. That if you simply offer it to people but saying the people have to pay a hundred percent, the only people who opt in are the people with the most grievous preexisting medical conditions and then the loss rates are so high everybody else leaves the plan and then it gets too expensive.

So you need some kind of subsidy and it's unlikely that we will have clarity about the health coverage tax credit at that point and we need to have something so that vendors would even commit to a program. So we need to negotiate some subsidy with Delphi in return for giving up all of the appeal rights and go to the vendors and say, we're looking at a subsidy of X dollars per month for twelve months, after which time we think that there's a substantial likelihood that the health coverage tax credit will kick in because the pensions, by that time, may be turned over to the PGBC.

THE COURT: So what is the clarifying event?

MR. GLOSTER: What one has to do is quickly negotiate a deal with Delphi and put out an RFP to the vendors that we've

previously identified. They will respond within two weeks about what their plans would be, the alternative plans that they would set up. We would select those plans after they've provided us the pricing and then roll those out to the retirees under some kind of announcement that here's going to be the new benefit. And as we work with the vendors and our broker about what the timeline is, having told them, look we're going to have to do this on what's really an insanely short time frame, what they're telling us is July 1 is something that is achievable.

THE COURT: I'm sorry; and why is that again?

MR. GLOSTER: Because we have to get the information from Delphi in order to both, (a) send out a request for proposals so that we have the pricing information for what the actual losses are.

THE COURT: Right. But you said you were close to that. I mean, that's a matter of --

MR. GLOSTER: Right. Although it's binary, Your Honor. We either have the information or we don't.

THE COURT: I understand that.

MR. GLOSTER: And then we send that out to -- we put that in an RFP, we send it to vendors, we get their pricing. We also --

THE COURT: I thought that was in about two weeks.

MR. GLOSTER: The vendors have committed to us that

they could get back to us in two weeks.

THE COURT: Okay.

MR. GLOSTER: Assuming we had all this information and could get this information out to the vendors and could negotiate some sort of subsidy with Delphi so that they would be willing to commit to that, that's what that looks like. And then we have to -- and invariably some of the vendors are not right on the two week deadline but we'll get it to you the week after. And then from those vendors' benefits we have to select, we're going to go with Blue Cross or with Aetna or with whoever and here is the high option and here is the low option and here's the HMO option. And then we need to actually put that together and then roll it out and put all of the -- they have to put the information out to all of the retirees saying here is the benefit and we have to set it up through a VEBA and then we go ahead and have an open enrollment period and people have the opportunity to opt into that benefit.

And more to the point, let's say Your Honor granted even just a thirty day stay and so that people have the existing subsidies through the end, not of March but the end of April. Ideally we would, before the end of April, be able to tell retirees look here is what's going to come -- here's the benefit that's going to be available and here's the subsidy that's going to be available effective July 1. And as you make your healthcare choices you may want to consider simply paying

for the existing benefit from Delphi with whatever much smaller subsidy we've negotiated with Delphi between now and then. And then if people don't end up doing that, at least by the time the new benefit kicked in they would have only been out of creditable coverage sixty days not sixty-three days. And people would have an information point about whether it is that they ought to just go get some kind of catastrophic medical coverage that's not creditable coverage from their own state.

THE COURT: Why is this something that needs to be dealt with now as opposed to, say, by the District Court two weeks from now or thirty days from now?

MR. GLOSTER: Well, if Your Honor denies the motion --

THE COURT: When I say deal with it by the District Court I mean a stay pending appeal by the District Court.

MR. GLOSTER: Your Honor, if you deny this motion then of course what happens is we go to the District Court and we ask the District Court to address it. But I think that there are considerations here -- there's an enormous amount of uncertainty for the retirees right now. There are issues about people who say that they're not getting the notices. There are issues if someone's on vacation out of the country they'll just never know what's going to go on. And I think that --

THE COURT: Well, that --

MR. GLOSTER: We can't solve that problem.

THE COURT: We could never solve that problem. I mean, depending on how long their vacation is.

MR. GLOSTER: But Your Honor, when you deal with that many people --

THE COURT: They're still going to have the uncertainty because it would only be a stay pending appeal, there's still uncertainty.

MR. GLOSTER: Your Honor, we live in an uncertain world these days. I understand that and all we can do is do the best that we can, understanding that there are trade offs for everything. And I just think that the balance of the harms here weigh strongly in favor of a limited stay to protect retirees.

THE COURT: I'm just trying to figure out when the irreparable harm kicks in. Does it kick in April 1st or does it kick in towards the end of May or the beginning of June?

MR. GLOSTER: I think it kicks in April 1st because I think that just in figuring out what it is that we have to do, if we can't get at least one more month then we're just going to run out of --

THE COURT: What I'm saying is, you wouldn't stop doing what you just outlined to me if a stay were not granted. You'd keep doing it; the danger of it not working would become more and more imminent. And at the same time the District Court might rule.

MR. GLOSTER: That's true, Your Honor. But when you look at what the consequences are, number one, just as Delphi says look we can't tell you that if we don't save a dollar in cash flow now it's the binary difference between the whole thing falling apart and not. But there's always a risk there and it's actually quite difficult to line up vendors to commit to an under sixty-five health plan without a substantial employer subsidy. As we get to March 27th and people find other health plans because there's nothing in place here and go ahead and enroll in a different plan, we have fewer and fewer retirees to bring to the table and less critical mass and it becomes more difficult.

And then, if the Appellate Court does in fact rule in our favor, and then we come back before this Court and say well, we're going to go through the 1114 process, we're going to negotiate something for retirees in return for giving up these benefits, by then they've been out of creditable coverage for more than sixty-three days and there's just limits to what we can all do.

THE COURT: Well no, if it's reversed they won't be out of creditable coverage because the debtor will have to offer it to them.

MR. GLOSTER: Well if it's reversed they will have lost their benefits on April 1. And if the appellate process goes through sixty days then --

THE COURT: I understand that. If the appellate process takes longer than the sixty-three days, I understand that point. I understand that point. I'm just -- in terms of weighing the harms and the record today versus the record that might be in front of a District Court forty-five days from now, I'm trying to figure out who -- where the balance of harms tips, just in terms of the timing point.

Let me raise another issue, which is the absence of a bond here. The courts have been pretty clear in putting the onus on the movant for a stay pending appeal to explain why a bond isn't appropriate and there's – that you don't need to protect the appellee because of the cost of the stay ultimately being unrecoverable, if the appellee continues to win.

MR. GLOSTER: I guess the answer, Your Honor, is that we don't have the capacity to get the retirees to kick in for the bond. There's, sort of, a rather amorphous group of retirees on my side of the table. And if they had access to twenty million dollars they wouldn't be facing the hardship from the termination of benefits.

THE COURT: Well, now we're talking about four million, right? Because it's really thirty days tacked on to June that we're talking about.

MR. GLOSTER: That's true, Your Honor, but I think we're still one or two orders of magnitude off about our ability to go out and pass the hat in front of the retirees.

THE COURT: I understand that your clients are very sympathetic clients, probably more sympathetic than the landlord in Judge Lynch's case that the debtors cite. But Judge Lynch made the point that just because the landlord was unable to post a bond, doesn't relieve the landlord of the duty to justify to the Court why the appellee shouldn't be protected.

MR. BUTLER: Well, all I can say, Your Honor, this is a close question, at best, of statutory interpretation. It's an issue that the Second Circuit has not ruled on. It could work either way and frankly, I think, were we in opposite positions here and the debtor was before the Court saying, you know Your Honor, it's a different situation but we want to appeal this issue, you, like other judges, have discretion to waive the requirement for a bond and particularly when we're simply --

THE COURT: Actually, I'm not sure I do. I was actually reversed on this issue in what I thought was the most appealing situation, where the appellees were relying upon the continued funding and management of West Point Stevens, were not looking to sell their stock, were relying upon the continued viability of the enterprise. And it seemed to me, under those circumstances they shouldn't force the appellant, who was funding the enterprise, to have to post a bond. And the District Court said no, they have to post a bond.

MR. GLOSTER: Well, all I can say --

THE COURT: A 200 million dollar bond, in fact, even though they were, at the same time, putting in money that was propping up the value of the stock that these people weren't selling.

MR. GLOSTER: Well Your Honor, all I can say is my clients can only do what we can do, which is to seek to expedite the appeal, to limit our ask to the portion of the benefits that are the most critical and create the greatest harm, to cooperate about filing our notices of appeal and our designation of issues and designation of the record as quickly as we can. And to cooperate with the debtor to get it resolved as quickly as possible.

And then, Your Honor, frankly if what we get is a thirty day stay, actually the risk is on us. We're likely to go beyond thirty days with an appeal, although I don't know. That's really up to the District Court. We can only do what we can do but whether it's 200 million, twenty million or two million dollars, we cannot raise that from our clients.

And I suppose I'm willing to take the risk, working for free at one level, but we don't have twenty million to front the clients either.

THE COURT: Okay. All right. Thank you.

(Pause)

MR. HOGAN: Good morning, Judge. Al Hogan of Skadden

Arps for the debtors. Before I get going I do want to clarify one matter that we also conferred with counsel prior to the hearing. That's the evidentiary record on this hearing. Neither party has any new evidence but we both do incorporate the full evidentiary submissions that were admitted in the first and the second hearing with respect to the debtors' motion.

THE COURT: Okay.

MR. HOGAN: Judge, I want to begin by addressing some of the questions that you asked. As well, I think I've got some additional information that might help Your Honor and I think it leads into the discussion in the light of what was just presented by counsel.

The first question is that, in terms of the quantification of the cost, the debtors presented evidence at the hearing on this matter, uncontroverted evidence, to the annual expected savings for reducing these benefits was approximately seventy million dollars a year. That was an estimate that worked out to approximately one and a half million dollars a week or six million dollars a month. And Judge, that estimate did not include the one percent subsidy for existing employees' accounts and so that's a separate issue.

And counsel is correct, I've verified that the vision and dental savings really is only somewhere between five and

ten percent of that number. So what counsel referred to as the critical aspect of this is still ninety to ninety-five percent of that six million dollar estimate going forward, per month.

THE COURT: So we're talking about five million to five and a half million a month?

MR. HOGAN: 5.3, something along that line. So the lion's share of the expected cost savings does come from the elimination of health care and prescription drug coverage. And that does happen on a monthly basis. And that's the debtors' best estimate of the savings going forward. That's based on the same actuarial assumptions and retirement assumptions that the debtors have annually imposed. And so we think that there's very little to save.

I appreciate that here at this hearing the Association recognized that the debtors actually are expending money here. I was, frankly, taken aback by the statement in the initial stay motion that no party in interest would be harmed here if a stay is granted and the Association is ultimately unsuccessful on its appeal. I think the record is clear, we just clarified it. The answer is six million dollars a month over what's at least requested in the motion -- a ninety day stay. That's approximately a twenty million dollar expense. And Judge, that is direct harm to the debtors. As Your Honor observed in the modified bench ruling, bankruptcy is a zero sum game and so it's not so much the debtors on one hand

versus the retirees on the other. It's the retirees relative to all of the other stakeholders in this case.

And so, twenty million dollars at a time of the current liquidity issues that the debtor faces is real harm, it's concrete harm. That clearly satisfies that prong of the test in terms of evaluating the stay.

Another observation, Judge, is what we just heard really is that opposed to seeking a stay pending appeal, what I think we heard, in a very candid discussion, frankly, is that the Association is asking for a stay that really, I think, is almost a disguised motion for reconsideration of the same kinds of stay and delay arguments they made on the initial motion.

So the underlying premise that on April 1 people will fall out of creditable coverage and that's a harm that seeks to be avoided is something that was presented to this Court on the initial motion. And we've moved -- the debtors' countervailing evidence is that the debtors have a real present need to conserve that cash and to get those balance sheet liabilities off the books so we can proceed with the restructuring efforts.

But Judge, the harm that the Association is talking about here really relates to their characterization of a loss of creditable coverage. And I think we can break that down and look at it in a couple ways. First is that the notion, and I don't need to dwell on this -- I think from the prior comments it's clear that the Court already comprehends this -- the

notion that people are going to unwittingly lose their coverage as of April 1 is not substantiated in this record, Judge.

And we handed up to the bench this demonstrative chart, counsel has this as well. I'm not going to spend a lot of time going through this.

THE COURT: I don't think I have it.

MR. HOGAN: May I, Judge?

THE COURT: Sure.

(Pause)

THE COURT: Thank you.

MR. HOGAN: So Judge, the purpose of this chart is just to simply show that from early February, the time that the debtors filed the motion, till what will run a period that's greater than two months, out to April 15th, the affected retirees have had clear notice that these benefits are being terminated.

They've also had clear notice since the beginning of this process that they have the option to elect continuing coverage and that if they do so there's no break in coverage, there's no break in creditable coverage. And that's been explained from the beginning of this timeline and it will be explained again in our “second chance” notice. But if you go back to the beginning, the February 5th letter that was mailed by Delphi, that was Exhibit 1 to Mr. Gebia's (ph.) declaration. One of the objectors actually criticized the debtors for making

that letter too stark, too conclusory in terms of the fact that these benefits were going to terminate on April 1. I didn't think that objection was well founded because we also discussed the motion in that letter.

But it is clear, as of February 5th, every retiree was mailed a letter that said your coverage is going to terminate on April 1.

Then after the hearing we mailed the election forms, which again went through the ramifications of not continuing coverage. We went through the steps that folks had to take to elect coverage. We filed the supplemental notice concerning the formation of the Retiree Committee. And then, Judge, going along the time line, after March 27th, when the initial election forms are due, we are going to send another plain English notice that explains the ramifications, both with respect to not being able to opt back into the Delphi plans, the potential loss of creditable coverage that's going to occur. We're going to explain all of that to people. And so I think if you look at this front to back there's --

THE COURT: And they will have until April 15th, those people that haven't yet made the switch? Those people who didn't yet make the switch will have till April 15th to do that?

MR. HOGAN: That's correct.

THE COURT: Retroactive to the 1st?

MR. HOGAN: Retroactive to April 1.

THE COURT: So there wouldn't be any gap for those people?

MR. HOGAN: No gap for those people. That's entirely correct. And so what the harm here, that I think the association is really trying -- what it really boils down to is that retirees may choose to not continue to elect Delphi coverage. The ramifications are going to be clearly spelled out and the options are going to be clearly available all the way through April 15th to continue that creditable coverage.

And Judge, when you put it in those terms it really is, will the retirees be harmed in some sense by their choice to not continue coverage? And it boils down to where should the economic cost for this coverage be shifted? And again, it's not so much the debtor it's should the debtor's stakeholders bear the cost of retirees continuing their creditable coverage until such time as either the Association is able to work out whatever arrangements they want to work out. And we heard a lot about that and Judge, they have their goals but none of that is certain.

Or is it such time until, consistent with the final order and a PBGC triggering event, which we all hope doesn't happen. But if that does happen the mechanism is in place where if people elect to maintain coverage the VEBA will be created and they'll be entitled to the eighty percent

healthcare tax credit. That's already put in place. And so I think that it's not the clear, concrete substantial harm that's required to demonstrate a stay to say that people are ultimately going to have a choice as to whether or not to continue coverage and to exercise that choice with full information about the ramifications.

Judge, the issues with respect to COBRA coverage, frankly that's still a little bit murky to me. But two things on that. There's two COBRA issues rattling around here. One, I don't think we need to spend a lot of time on. The Court agreed with the debtors' interpretation of the COBRA lifetime event coverage plus or minus one year. We don't think a COBRA event has happened in that respect. And so our notice wasn't misleading in any respect, nobody's harmed by that.

The recent amendments to the COBRA legislation surrounding reimbursement for COBRA coverage, again that's -- frankly, I think that's an issue of two ships passing in the night. If there are changes to the COBRA regulations that require COBRA notices to be sent and allow for people to elect COBRA coverage, which by the way would be an alternative different than electing to stay in the Delphi plan, but if people want to make that election and there is a subsidy available under the new legislation, Delphi's going to evaluate that and send out COBRA notices.

Just to be clear, Delphi has and is continuing to

send COBRA notices regarding this termination event to people who have retired within the prior eighteen month window, the company's interpretation of the applicable regulations is that those people are entitled to COBRA notices. Those are being sent out. If people want to choose COBRA, the company's view on those is they can do that. There are ramifications to doing that in terms of COBRA being a distinct and mutually exclusive option for continuing in the Delphi plans. But the COBRA issues, really here, I just don't think there's any basis to consider a stay here to allow new legislation to be more fully vetted through regulations or otherwise. Those matters will be dealt with if and when it becomes appropriate for Delphi to send out those COBRA notices.

Judge, you asked another question in terms of when does the irreparable harm kick in. Again, I just want to reiterate, the point here is the retirees can avoid the irreparable harm that really is at the essence of what the Association is talking about by electing to continue the coverage, and they'll have plenty of options to do that.

The last issue, Judge. To touch on the requirement of a bond, I think you have the standard correct. I think we've cited it correctly in our papers. The Association's statement that somehow this is a money judgment and so a bond isn't required is just plain wrong. A bond is the typical requirement in cases like this. And again, we're dealing with

a sympathetic group of movants in this case, there's no question about that. But it's really the -- it's almost an inability to pay argument based on -- based on, sort of, the associational character of the movants who are here in front of the Court. And so, there really is no evidence with respect to individual retirees' ability to pay. And I would submit that it's incongruous to allow a representative body to come before the Court but then to stand back and say well, because we're a representative body we don't have the mechanisms for implementing what is the very standard and I think very common requirement of a bond in this case.

Again, it comes back to the -- the bottom line point, Judge is that a stay, and certainly a stay without a bond, takes what is right now an obligation that Delphi does not have and shifts it back on to Delphi. And the Association's motion for a stay, as we've heard it, is really a motion for a stay so that the Association can continue their own goals and objectives for how this coverage situation plays out.

The debtors don't know if the Association is going to be successful, there's an awful lot wrapped up in that. Will they be able to get vendor coverage that's attractive? Mr. Gloster represented settlement discussions with the debtors, and I think it would be inappropriate to go into those, but there's absolutely no certainty of that. So as to the real question, I think it comes down to, is a stay

appropriate in a circumstance where what's being requested is a stay for the committee to pursue its goals and its objective. And the effect of that is to shift what is ultimately just an economic -- just an economic, you know it's hard to say that but it is an economic question from the retirees back to the other stakeholders of Delphi.

And so, because the harm to Delphi is clear, because I think that the potential harm to the retirees is not at all concrete and is avoidable in its entirety and because I think that the other factors here tip in Delphi's favor heavily, I don't believe a stay is appropriate in this circumstance.

THE COURT: Are the debtors as committed to an expedited appeal as the appellants here?

MR. HOGAN: We are, Judge.

THE COURT: Okay. Has the record been transmitted yet?

MR. HOGAN: The record's been filed. It hasn't been docketed. We don't have the District Court. What I hope to do is work with counsel for the Association to do everything we can, substantively and procedurally, working with the various clerks to consolidate and expedite these appeals.

THE COURT: Okay.

MR. HOGAN: Thank you, Judge.

THE COURT: Thank you.

MR. GLOSTER: Very briefly, Your Honor, just a couple

of things. First, the debtors in their motion, originally, to terminate benefits said that the all-in cost of all of the benefits that they were terminating for post-employment, other post-employment benefits that were not pensions was seventy million dollars. That expressly did include the one percent and those different benefits were discussed on pages 6 and 7 of Steven Gebia's declaration.

In fairness, I don't think that the one percent is a huge portion of this. But what we're really talking about is a cost that is somewhere on the order between four and five million. It's four million in the past; I'm not sure how they get to five million here.

THE COURT: Well, if it's ninety percent wouldn't it be five plus?

MR. GLOSTER: Yes, my understanding is that the one percent of salary for the 2,300 employees where it's paid for their future healthcare is probably something on the order of three plus million dollars a year. And that the cost of the vision care and dental is something like ten percent of this.

THE COURT: Okay.

MR. GLOSTER: But I'm not quite sure how they ever get to how many things are in the seventy million. What we can calculate from what they've given us is in the past the health and prescription drugs have been about four million. When we try to back it out from what -- there's some uncertainty that

it might be less than that, but it might be five million dollars under their numbers.

THE COURT: Okay.

MR. GLOSTER: The other issues is, you know, the notion that it's not a harm because individuals may choose not to elect Delphi coverage, and it's just up to them. The practicalities are that these are thousands of retirees living on limited income. And to say that they simply choose not pay the full cost of the benefits is that they choose to pay their rent instead. You know, that's the real difficulty. We've got thousands of people on fixed incomes who, you know, are reliant upon these subsidies for their current level of healthcare and now have to obtain some other benefit, and that many of them are early retirees who left the company because there was a healthcare benefit and, you know, they were allowing the debtor to downsize, and they put in their twenty-five years, mostly at GM and then at Delphi. And many of them had an understanding, whether legally accurate or not, that they were to get lifetime medical benefits. And, so, that's who we're really talking about here. And, in fact, there are some real practical reasons why people are going to fall out of coverage.

THE COURT: Well, but, again, if your clients win on the appeal then that coverage is reinstated, right. So we're talking about some period between now and mid-June where the harm is to an unspecified number of people who need to have

health coverage at that point and can't pay for it. Or not between now, you know, between April and --

MR. GLOSTER: I think as a practical matter, what really happens, Your Honor, assuming that we win on appeal, I think that the Appellate Court simply says look, you need to go through an expedited 1114 process before you terminate all these people.

THE COURT: But until that happens the debtor is liable, right?

MR. GLOSTER: Well, is liable. But I think what we end up with is probably an administrative claim. Because we can't simply on June 27th say okay, you guys are back in benefits. You have to -- some of them are paying for other healthcare coverage, there's all kinds of stuff going on. What really happens is the debtor comes to us and says look, we're going to make a proposal very quickly, we need to get this dealt with very quickly. And you know that our judge has already ruled that we're facing serious financial difficulties, and these are amendable benefits. So even under the 1114 process you're not going to end up with a full subsidy, let's talk about what you're really going to get.

THE COURT: No, I understand. But for the period we're talking about, the period before the District Court rules, I guess I can see that there might be some people, although it's not clear to me from the record how many or to

what extent, who will not be able to pay for coverage, any coverage, any replacement coverage, starting April 15th. But if you win on appeal then, you know, the debtors' modification or termination of the funding for that coverage from April 15th forward would have been improper so they would owe that coverage to them. And those are people who don't have coverage. So I would assume they'd put them back in the plan, retroactive.

MR. GLOSTER: I don't think it could work that way, Your Honor, because when you show up at the hospital or your healthcare provider, at that point you either have coverage or don't. You don't say hey, six days from now --

THE COURT: I agree. There's a potential there for a gap before the Court rules, right.

MR. GLOSTER: And I think that gap is probably going to be filled if we win on appeal with an administrative claim. But I think the administrative claim doesn't put people back where they sort of need to be.

THE COURT: Why wouldn't they have just put them back, and so that they could go to the hospital and say -- from then forward, they could say well, we're --

MR. GLOSTER: Well, they can re-enroll people after the Appellate Court. But I don't know sort of what their situation is going to be. But to put people into a group plan after they've had a lapse of creditable coverage --

THE COURT: I'm not saying that. I'm saying that -- I'm leaving aside the creditable coverage issue. I'm saying that it seems to me that given the parties' commitment to an expedited appeal, given the record in this matter and the nature of the issues, you know, this is something I would think that a District Court would rule on promptly and could easily rule on it for June 15th, I would think. And, if not, I would think that a Court, at that point, would consider whether there should be a stay. The Court would know then -- the state of the record, would know how long he or she's going to take to rule, would know better how long you might want to provide for some sort of injunction.

MR. GLOSTER: That's possible, Your Honor. Or the Court may, in the meantime, rule that there is a stay.

THE COURT: Oh, yes, sure. I understand that. It just seems to me given all that you laid out to me, and the main risk being the risk of losing preexisting condition coverage, it seems to me that this is premature.

MR. GLOSTER: Well, Your Honor, respectfully, I think it is not premature because time moves very quickly at sixty-three days, and these contacts is a short period of time. And I think any protection we get on the front end really gives us enough time to try to work something out so that people don't lose that.

THE COURT: But you'll still be doing that, won't

you? Let me ask this of the debtors. My assumption is that the debtors will continue to provide the information. If I denied the stay today, you're not going to say oh, well, we don't have to do anything at this point. You're going to complete providing the information that they've asked for in connection with --

MR. BUTLER: Your Honor, we've been providing it to the Delphi Retiree Salaried Association, that's correct. And we've been providing that information to them. The retirees' committee's responsibilities in that regard were discharged in the prior order as a retirees committee. But we're cooperating, Your Honor, we have been.

THE COURT: Okay. And you wouldn't view this, if I denied this request, as a license to stop talking with them?

MR. BUTLER: No, Your Honor, we would not.

THE COURT: Okay.

MR. GLOSTER: Respectfully, I do want to clarify something. The retiree committee is obligated under this Court's orders to negotiate with the debtors regarding modifications of those orders in return for giving up the appeal rights of the retirees.

THE COURT: I don't want to get into that. I think the orders say what they say, and I think they have an incentive -- both sides have an incentive to continue to talk. And, luckily, you're representing -- you're wearing two hats.

Okay, anything else?

MR. GLOSTER: No, Your Honor.

MR. HOGAN: Nothing further, Judge.

THE COURT: Okay. Appellants from my February 25th order, which was then made a final order -- when was it March 13th? March 13th -- granting the debtors' OPEB termination motion have moved under Bankruptcy Rule 8005 for a motion staying that order pending their appeal. The debtors have opposed the motion. The motion for a stay was somewhat modified on the record today. Rather than a ninety-day stay of all of the order, the movants today sought, in the first instance, a sixty-day stay of the order and, in respect of that order, only insofar as the order would pertain to termination of the debtors' funding of healthcare and prescription drug benefits, under the welfare plans.

As a fallback, the movants have sought a thirty-day stay, tying the logic of that stay into their hopes that the rights in respect of COBRA coverage and the implication of the American Recovery and Reinvestment Act would be clarified within that thirty-day stay period.

The legal standards for granting a stay pending appeal are fairly clear, with one exception, which I don't believe is dispositive either way here. The party seeking a stay has the "heavy burden" to demonstrate (1) whether the movant will suffer irreparable injury absent a stay, pending

appeal, (2) whether a party wouldn't suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although, less than a likelihood of success on appeal, and (4) the public interest that may be affected. See In re Calpine Corporation, 2008 Bank. LEXIS, 217 at page 10 (Bankr. S.D.N.Y. 2001). In that opinion Judge Lifland noted, without deciding, that there is authority for either the proposition that all four factors must be met for a stay to be granted, or the proposition that a balancing test among those four factors must be performed to determine whether the stay should be granted. Id. at pages 11 through 12, citing In re Tower Automotive Inc. for the former proposition at 2006 WL 2583624 at page 1 (Bankr. S.D.N.Y. June 28, 2006), and In re Turner, 207 B.R. 373, 375 (2d Cir. B.A.P. 1997), and then in comparison with those cases and in support of a balancing approach, citing In re Adelphia Communications Corp., 361 B.R. 337, 346 (S.D.N.Y. 2007), and, in addition, Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002), in which the Second Circuit said the probability of success must be demonstrated as inversely proportional of the amount of irreparable injury plaintiff will suffer absent the stay: simply stated, more of one excuses less of the other.

Again, as I said at the beginning, I believe that analysis of this particular motion is the same, or reaches the same result, under either of those two approaches. That is

first and foremost because in any event -- that is, under either approach -- a showing of irreparable harm is the "principal prerequisite" for the issuance of a stay under Bankruptcy Rule 8005. Grand River Enterprise Six Nations Ltd. v. Pryor, 481 F.3d 60, 66-67 (2d Cir. 2007) (in which the Second Circuit said “we have stated that irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction and that, accordingly, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered”), as well as Adelphia Communications Corporation, 361 B.R. 347. The moving party must prove that it faces irreparable harm that is "neither remote nor speculative but actual and imminent." Freedom Holdings Inc. v. Spitzer, 408 F.3d 112, 114 (2d Cir. 2005), and Tucker Anthony Realty Corporation v. Schlesinger, 888 F.2d 969, 979 (2d Cir. 1989). Moreover, merely invoking equitable mootness is not sufficient to demonstrate irreparable harm. In re Board of Directors of MultiCanal S.A., 2005 Bank. LEXIS 1865 at page 6 (Bankr. S.D.N.Y. January 6, 2005), and In re Baker, 2005 WL 2105802, at page 9 (E.D.N.Y. August 31, 2005).

The termination of the retiree benefits at issue here effectively does not kick in for those who have not obtained replacement coverage until April 15, 2005. Moreover, it's recognized that the primary danger for such people is the

inability to subsequently obtain coverage that would cover preexisting conditions. However, that inability, if it arises, that is, if people are not able to obtain coverage that would preserve existing condition coverage, that event would occur at the earliest given the April 15th date that the debtors have committed to in connection with their so-called "second chance" letter, until mid-June, effectively June 18th, given the sixty-three day period that needs to expire.

Given that timing as well as the state of this record, where I suppose I can infer that some individuals will not have the wherewithal to obtain replacement coverage, but that there is no evidence of that fact, to my mind says that the irreparable harm that the movants have posited here is not actual and imminent. Rather, it seems to me particularly given the parties' commitment to an expedited appeal as well as the debtors' commitment to continue to explore the potential consensual resolution of such an appeal on an expedited basis, that it would be appropriate, instead, to have a second look at the issue of a stay pending appeal weeks if not months from today, and that that look would be by the District Court, who would then, I'm assuming, have been at least briefed on the applicable underlying issues, if not having heard oral argument, and, perhaps, also, could have already ruled by that date. At that point, also, it would seem to me that the issues I think of secondary importance will have been further

clarified, those issues being the status of any additional regulations under the Recovery and Reinvestment Act, as well as the fruit of any additional work that the retirees had done with regard to a potential alternative VEBA.

So I do not believe that the movants, on this record, as of today, have established irreparable harm, although, as I said, they may do so at an appropriate time, sometime in the coming weeks or months.

In addition, under the four factors, in addition to showing irreparable harm, the party seeking a stay must also establish that the non-moving party, that is, here, the debtors, or other parties, will not suffer substantial harm if the stay is granted. In other words, the moving party must show that the balance of harms tips in favor of granting the stay. Here, the record shows that the cost of a stay pending appeal is somewhere between four and a little over five million dollars a month. In terms of this particular -- or these particular debtors, that cost is truly significant, given, in essence, the biweekly or monthly extension of their financing and their great need for the conversion of cash. The Court's always reluctant to balance dollars versus individuals' health, but ultimately, here, I believe, we are talking about dollars, again, on this record, since there is a clear opportunity for the retirees to obtain coverage that they would be funding and that that opportunity would not be necessary again until April

15th, and, moreover, would not create the preexisting condition issue until mid-June.

The issue of substantial injury to the debtors is magnified significantly here by the conceded inability of the retirees to post a supersedeas bond that would -- or a bond pending appeal that would protect the debtors against the cost of this stay, between eight million and ten million dollars. It appears clear to me that if I were to issue a stay pending appeal, and the debtors continued to prevail, as they did before me, on appeal, they would never get that money back; it would never be paid over to them, it would be gone. And, therefore, a bond here is quite meaningful in that context. It's clear to me that the movants here have not carried their burden to provide specific reasons why the Court should depart from the standard requirement of granting a stay only after posting a bond because, generally speaking, the elimination of such a requirement should occur only if the failure to post a bond does not unduly danger the other party's interest. See In re Westpoint Stevens Inc., 2007 U.S. District LEXIS 33725 (S.D.N.Y. May 9, 2007), as well as In re DJK Residential, LLC, 2008 U.S. District LEXIS 19801, (S.D.N.Y. March 7, 2008).

Given those two factors which argue against granting a stay here, I do not believe I need to go into a lengthy discussion of the likelihood of success on the merits or the public interest, or the public interest point. The equities I

believe at best for movants balanced here, or given the balanced tension of the interests in the retirees that I've outlined in connection with the discussion of irreparable harm, as well as the interest of not only the debtors but all of their constituents in connection with the -- that I've discussed, in connection with the substantial injury to the nonmoving party factor.

With regard to likelihood of success, it is clear here that at least one court has taken a contrary view than I did, and as did the authorities that I've relied upon. That is, the Farmland court. So I believe that, standing alone, there is a serious legal question going to the merits. However, I do not believe that in even a proportionality-based analysis, here, the issue of likelihood of success would outweigh the other factors that I've already discussed.

In most instances where there is a level of dispute with regard to ultimate success on the merits that exists here, and some showing of irreparable harm, I would normally issue a stay that would at least enable the appellant to rush over to District Court and seek a further stay. But I don't believe that is appropriate here, again, given the timing that I've outlined. It would seem to me that the stay issues, rather, become ripe towards the end of May, if not the beginning of June. And that, in any event, if the movants want to convince the District Court otherwise, they certainly will have time to

do so before the debtors would be taking irretrievable action.

So for those reasons I'll deny the motion.

MR. HOGAN: Judge, just if I could, one minor point of clarification. In the discussion that you just delivered, Your Honor referenced the date of June 18th as the date for the creditable coverage sixty-three day period lapse, actually I think I agree with Mr. Gloster, the date would actually be June 3rd, because the April 15th -

THE COURT: Oh, it would be retroactive to that date?

MR. HOGAN: That's right, retroactive to April 1.

THE COURT: That's fine.

MR. HOGAN: So I wanted to be sure we were clear on that.

THE COURT: It's still in June, though, so I think there's time for these issues to be clarified further.

MR. HOGAN: Correct, Judge.

THE COURT: And perhaps even mooted out if, as I think may be the case here, given the importance of this matter, the District Court might well rule before then.

MR. HOGAN: Thank you, Judge.

THE COURT: Mr. Gloster, you or maybe it was one of your colleagues, raised the issue of a direct appeal. And I looked at that a little more thoroughly after you were done. As I read the statute and I think the case law, since these cases were filed before BAPCPA, I don't think I have the

ability to certify a direct appeal to the Second Circuit.

MR. GLOSTER: I agree, Your Honor.

THE COURT: Okay. Thanks.

(Proceedings concluded at 11:41 a.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a true and accurate record of the proceedings.

Pnina Eilberg

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Date: March 19, 2009